Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:	)	
	)	
NATIONAL CITY MORTGAGE CO.	)	CG Docket No. 02-278
	)	
Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes	)	

REPLY COMMENTS OF NATIONAL CITY MORTGAGE CO. IN SUPPORT OF PETITION FOR EXPEDITED DECLARATORY RULING

National City Mortgage Co. ("NCMC") hereby replies in support of its Petition for Expedited Declaratory Ruling ("NCMC Petition" or "Petition"), filed with the Commission on November 22, 2004.[1]

In its Petition, NCMC advised the Commission that it had received a complaint notice from the Florida Department of Agriculture and Consumer Services ("Department"). The complaint notice stated that NCMC had "played a prerecorded sales message, without their express consent, to [a specified Florida telephone number]."[2] According to the Department, this claimed action violated section 501.059(7)(a) of the Florida Statutes, which provides that "[n]o person shall make or knowingly allow a telephone sales call to be made if such call involves an automated system for the

[1] Petition for Expedited Declaratory Ruling (CG Docket No. 02-278, Nov. 22, 2004) ("NCMC Petition" or "Petition").

[2] NCMC Petition at 2.

selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called."[3]

After confirming that the Department would not withdraw the complaint notice and intended to enforce its statute as to interstate calls placed to Florida residents, NCMC brought its present Petition. As the Petition points out, the Florida statute is more restrictive than the Commission's rules, which provide that a person or entity may initiate a telephone call to a residential line "using an artificial or prerecorded voice to deliver a message without the express prior consent of the called party . . ." if the call is made "to any person with whom the caller has an established business relationship at the time the call is made."[4]

Except for the State of Florida's Motion to Dismiss For Lack of Jurisdiction and Other Grounds ("Florida Motion" or "Motion"), no party has filed in opposition to the Petition.[5] Florida makes three arguments in support of its request that the NCMC's Petition for Declaratory Ruling be dismissed. First, Florida claims that the Petition is barred by sovereign immunity. Second, Florida argues that the Telephone Consumer

---

[3] *Id.*, citing Fla. Stat. § 501.059. Relevant portions of the Florida statute are appended to the Petition as Attachment 3.

[4] 47 C.F.R. § 64.1200(a)(2), (a)(2)(iv).

[5] State of Florida's Motion to Dismiss for Lack of Jurisdiction and Other Grounds (CG Docket No. 02-278, undated, filed electronically on Jan. 12, 2005) ("Florida Motion" or "Motion"); all other commenters support NCMC's Petition. *See* Comments of Verizon in Support of Petitions for Declaratory Ruling (CG Docket No. 02-278, Feb. 2, 2005) ("Verizon Comments"); Comments of the American Financial Services Association in Support of Petitions for Declaratory Rulings Filed by the Consumer Bankers Association and National City Mortgage Co. (CG Docket No. 02-278, Feb. 2, 2005) ("AFSA Comments"); Comments of Smart Reply, Inc. (CG Docket No. 02-278, Feb. 2, 2005) ("Smart Reply Comments"); Comments of MBNA America Bank, N.A. (CG Docket No. 02-278, Feb. 2, 2005) ("MBNA Comments"); Comments of The Mortgage Bankers Association (CG Docket No. 02-278, Feb. 3, 2005).

Protection Act ("TCPA") does not authorize preemption of the challenged provisions of Florida's telemarketing law. Third, Florida claims that it properly may enforce its claims against NCMC because those claims are different from any cause of action under the TCPA. All of these arguments are without merit, and Florida's request that the Petition be dismissed must be denied.

I. NCMC'S PETITION IS NOT BARRED BY SOVEREIGN IMMUNITY

With its present Motion, Florida joins New Jersey, North Dakota, Wisconsin and Indiana in raising the novel claim that this Commission is prevented from exercising its jurisdiction over interstate telecommunications by the doctrine of sovereign immunity.[6] Acceptance of this argument by the Commission would overturn decades of settled law and deprive the Commission of its ability to carry out its congressional mandate to regulate "all interstate and foreign communication by wire or radio . . . ."[7]

The principal authority cited in support of Florida's argument is the decision of the United States Supreme Court in *Federal Maritime Commission v. South Carolina Ports Authority* ("*FMC*"), in which the Court was required to decide whether a Federal Maritime Commission proceeding impermissibly placed the State of North Carolina in the position of an involuntary defendant in a private lawsuit.[8] The Court found that the

---

[6] North Dakota's 47 CFR § 1.41 Motion to Dismiss (Nov. 8, 2004); New Jersey Attorney General Reply Comments (Dec. 2, 2004); The State of Indiana's Motion to Dismiss The Consumer Bankers Association's Petition on Grounds of Sovereign Immunity (Jan. 24, 2005); Wisconsin Motion to Dismiss.

[7] 47 U.S.C. § 152(a).

[8] 535 U.S. 743, 760 (2002). "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government . . . . Nevertheless, the [Constitutional] Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework." *Id*. at 752.

Commission's proceeding *was* adjudicatory, but on the specific grounds that the proceeding was adversarial, was heard by an Administrative Law Judge, and was governed by rules of procedure and evidence effectively equivalent to those used in federal civil litigation.[9]

None of these factors is present in this declaratory ruling proceeding. In fact, as other participants in this docket have pointed out, the better comparison is to the preemption decision reviewed by the Sixth Circuit Court of Appeals in *Tennessee v. United States Department of Transportation ("Tennessee v. DOT")*, which found that an agency's consideration of a preemption request is not an adjudication and is not controlled by the rationale of *FMC*.[10] As the court in that case pointed out, describing a Department of Transportation preemption process that is identical in relevant respects to this Commission's preemption procedure:

> This [Department of Transportation] process differs dramatically from the one scrutinized by the Supreme Court in Federal Maritime Commission and, quite plainly, does not mirror federal civil litigation. There are no formal rules of practice or procedure, no formal complaint is required, there is no provision for answer by the state, and there is no formal discovery process . . . . The Administrator is not required to conduct a hearing, and if a hearing is conducted, it is not bound by the rules of evidence or civil procedure, nor is it handled by an administrative law judge.[11]

Like the agency proceeding at issue in *Tennessee v. DOT*, the FCC's consideration of NCMC's Petition is a notice-and-comment process that does not in any

---

[9] *Id.* at 758.

[10] 326 F.3d 729 (6th Cir. 2003) ("*Tennessee*"), *cert. denied*, 540 U.S. 981 (2003).

[11] *Id*. at 736. *See* FreeEats.com d/b/a ccAdvertising's Opposition to Motion to Dismiss (Nov. 18, 2004); American Teleservices Association Reply Comments (Dec. 2, 2004).

sense "mirror federal civil litigation."[12] Accordingly, there is no basis for dismissal of NCMC's petition on grounds of sovereign immunity, and the State of Florida's motion to dismiss must be denied.

II. THE FCC HAS PLENARY JURISDICTION TO REGULATE INTERSTATE TELEMARKETING CALLS PLACED TO FLORIDA RESIDENTS

Among other grounds, Florida contends that the Commission lacks jurisdiction over interstate telemarketing calls placed to Florida residents because the TCPA, by its terms, disclaims any preemptive effect.[13] Specifically, Florida cites §§ 227(e), 227(f)(6), 227(b)(3) and 227(c)(5) of the TCPA as disclosing Congress's intent to preserve state jurisdiction over interstate telemarketing.

None of these sections of the TCPA supports Florida's position. Notably, § 227(e) provides only that more restrictive state regulation of *intrastate* telemarketing will continue to be permitted after the TCPA takes effect. Similarly, § 227(f)(6), which is titled "Effect on state court proceedings," says no more than that an "authorized State official" may bring an action "on the basis of an alleged violation of any general civil or criminal statute of such state." This provision, which does not specifically address interstate calling, merely preserves the rights of the states to enforce their laws of general application -- for example, to prosecute a person who defrauds a resident of the forum state by means of statements made in an interstate call. It does not preserve any supposed right of the states to enforce their telemarketing laws against interstate callers.

---

[12] *Tennessee*, 326 F.3d at 736. In fact, the declaratory ruling procedure under which NCMC requests preemption of the Florida telemarketing statute has been applied by this Commission in a number of cases, and the State of Florida cites no occasion on which that procedure has been challenged, much less rejected, on sovereign immunity grounds. *See, e.g., Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004).

[13] Florida Motion at 7-8.

Finally, Florida mistakenly contends that §§ 227(b)(3) and 227(c)(5) of the TCPA are "intended to allow state court jurisdiction over interstate calls." Both of those sections, however, merely provide that state authorities may enforce certain provisions of the TCPA in state court. Those sections make no reference to the enforcement of *state* telemarketing laws, in state court or otherwise.

Florida also argues that this Commission's jurisdiction is limited by a strong presumption against preemption, and that this presumption applies with particular force when a state acts to enforce its consumer protection laws. The cases cited in support of this claim, however, do not support Florida's argument.

Notably, Florida's reliance on *Hillsborough County v. Automated Medical Labs, Inc.* ("*Hillsborough*") is misplaced.[14] In *Hillsborough*, the U.S. Supreme Court noted that an agency's decision to enact regulations in an area cannot, in itself, establish that the agency's "regulation will be exclusive." But the Commission's exclusive jurisdiction over interstate telemarketing, and the preemptive effect of the TCPA and the Commission's rules, are not based simply upon the FCC's decision to promulgate regulations. They are based upon the FCC's plenary authority, under the Communications Act, to regulate "interstate and foreign communications by wire or radio . . .," and on the specific congressional policy to create a uniform system of regulation for interstate telemarketing.[15]

---

[14] 471 U.S. 707 (1985) *on remand* 767 F.2d 748 (11th Cir. 1985), *supp. opinion* 775 F.2d 1430 (11th Cir. Fla. 1985).

[15] 47 U.S.C. § 152(a).

Similarly, the California state court decision in *Black v. Financial Freedom Funding Corp.* does not support Florida's position.[16] In that case, the court found that laws "concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the state's police power, and are thus subject to this heightened preemption against preemption." However, the ability of states to enforce laws of general application, which is expressly recognized in the Communications Act, does not extend to state laws that address matters specifically addressed by Congress to the Commission.

Finally, contrary to Florida's claim, the decision of the Eighth Circuit Court of Appeals in *Van Bergen v. Minnesota* does not stand for the proposition that the TCPA permits states to regulate interstate telemarketing.[17] *Van Bergen* involved only intrastate calls placed by a gubernatorial candidate, and the court's decision concludes only that a state law against automatic dial-announcing devices was properly enforced against the persons placing those intrastate calls.

III. THE TCPA REQUIRES PREEMPTION OF FLORIDA'S MORE RESTRICTIVE REQUIREMENTS

None of the comments in this proceeding denies that the provisions of the Florida telemarketing statute cited in the Petition are more restrictive than the TCPA and this Commission's rules. The State of Florida, however, contends that the TCPA and the Florida statute are not in conflict because Florida may base an enforcement action on conduct not specifically addressed by the federal rules.

---

[16] 112 Cal. Rptr 2d 445, 452-53 (Ct. App. Cal. 2001).

[17] 59 F.3d 1541 (8th Cir. 1995).

Leaving aside whether Florida's reading of the applicable law is accurate, the test for conflict preemption is whether state law prevents the achievement of policies of the Commission that are within the Commission's statutory authority. More specifically, in the case of telemarketing regulation, the applicable test is whether the Florida rules and federal law subject telemarketers to conflicting, inconsistent obligations when they place interstate calls. Even if the Florida statute permitted some causes of action that are different from, or in addition to, those that can be maintained under federal law, the conflicting obligations described in the Petition remain. Accordingly, Florida's Motion must be denied and the Commission should promptly grant NCMC's Petition.[18]

Respectfully submitted,

/s/ Charles H. Kennedy
Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

Counsel for National City Mortgage Co.

Date: February 17, 2005

[18] Florida also seeks denial of the Petition on the ground that "there is no controversy pending by Florida against National City Mortgage Co." because Florida merely mailed a letter with a copy of a complaint and copy of Florida's statute to Capital City Mortgage Co." Motion at 6. As NCMC pointed out in its Petition, however, Florida law permits the Department to follow up its notice with a complaint demanding injunctive relief, civil penalties of up to $10,000 per violation, attorneys' fees and costs. Petition at 3 n.7, citing Fla. Stat. § 501.059(8)-(9). The State of Florida's action, and the ongoing conflict in NCMC's obligations posed by the differences between Florida and federal law, create a controversy and subject NCMC to uncertainty concerning its obligations, thereby satisfying the standard for declaratory relief under the Administrative Procedure Act and the Commission's regulations. 47 C.F.R. § 1.2.

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 17th day of February, 2005, had copies of the foregoing delivered to the following, via First Class U.S. mail and electronic mail, as indicated:

Louis Stolba*
Senior Attorney
Florida Department of Agriculture & Consumer Services
Room 515- Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800

Dane Snowden
Chief
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Via Email: Dane.Snowden@fcc.gov

Jay Keithley, Deputy Chief
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via Email: Jay.Keithley@fcc.gov

Erica McMahon
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Via Email: Erica.McMahon@fcc.gov

* via First Class Mail

/s/ Theresa Rollins
Theresa Rollins